Supreme Court, U.S.
FILED
00 105 JUL 17 2000
OFFICE OF THE CLERK

No._____

IN THE

Supreme Court of the United States

October Term 2000

HECTOR A CUELLAR, A.K.A.
FRED CUELLAR,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To
THE COURT OF APPEALS FOR
THE FIRST DISTRICT OF TEXAS
CAUSE NO. 01-98-00572-CR

PETITION FOR WRIT OF CERTIORARI

SCHNEIDER & McKINNEY, P.C.
Stanley G. Schneider
Texas Bar No. 17790500
1301 McKinney, Suite 3100
Houston, Texas 77010
(713) 951-9555
FAX: (713) 951-9854

Alpha Law Brief Company • Houston, Texas • (713) 270-6604

25pp

ISSUE PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment allows a person to be convicted of violating a statute which has been repealed?

TABLE OF CONTENTS

ISSUE PRESENTED i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES
- Cases iii
- Statutes and Rules iii

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR REVIEW 4

CONCLUSION 8

APPENDIX A 1a

INDEX OF AUTHORITIES

Cases **Page**

Calder v. Bull,
3 U.S, (3 Dall.) 386(1789) 7

Cuellar v. State, No. 01-98-00572-CR
(Tex. App.-Houston {1*Dist.] September
2, 1999) (unpublished) 1

Dickens v. State
981 S.W.2d 186 (Tex.Crim.App. 1998) 5

Statutes and Rules

Act of May 17, 1991
72nd Leg. R.S. ch.565 5

Act of May 29, 1993
73rd Legis. R.S. ch.900 2

SUP. CT. R. 12 3

Tex Const. art. V, § 5 5

Tex. Pen. Code Ann. § 31.03 (Vernon 1994) 3, 6

Tex. Pen. Code Ann. § 31.09 (Vernon 1994) 3, 5

Tex. Pen. Code Ann. § 31.09 (Vernon Supp. 1991 5

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW HECTOR A. CUELLAR, Petitioner herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and pursuant to SUP. CT. R. 12, files this Petition for Writ of Certiorari and in support thereof, would show the Court as follows:

I. STATEMENT OF JURISDICTION

This is a writ of certiorari following denial of review by the Texas Court of Criminal Appeals.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

Petitioner was convicted of theft of more than $200,000 in the 338th Judicial District Court of Harris County, Texas, in Cause No. 743694. The jury assessed his punishment at 10 years incarceration, probated, and a $10,000 fine. The trial court also ordered restitution in the amount of $1,075,100. Cuellar filed a timely notice of appeal.

The Court of Appeals for the First District of Texas affirmed the judgment of the trial court in an unpublished opinion issued on September 2, 1999. *Cuellar v. State*, No. 01-98-00572-CR (Tex. App. - Houston [1st Dis.] September 2, 1999) (unpublished). A copy of the Court of Appeals' opinion is attached hereto as Appendix A.

Cuellar filed a timely petition for discretionary review with the Court of Criminal Appeals. The Court of Criminal Appeals denied review on April 26, 2000.

---

[1]The Texas Court of Criminal Appeals is the highest court in Texas with criminal jurisdiction. TEX. Const. art. V. § 5.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of his life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Act of May 17, 1991, 72nd Leg. R.S. ch. 565 § 12(a)

The changes in law made by Sections 1 through 5 and 7, 9 and 10 of this Act apply only to an offense committed on or after the effective date of this Act. For the purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

Act of May 29, 1993, 73rd Legis. R.S. ch 900, § 1.18

(a) The change in law made by this article applies only to an offense committed on or after the effective date of this article. For purposes of this section, an offense is committed before the effective date of this article if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this article is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Act of May 19, 1993, 73rd Legis. R.S. ch. 900, § 1.19

(a) Except as provided by Subsection (b) of this section, this article takes effect on September 1, 1994.

(b) The repeal of Section 12.422, Penal Code, as provided by Section 1.01 of this article, Section 16.02(i), Penal Code, as added by Section 1.01 of this article, and Sections 1.02, 1.06 and 1.16 of this article take effect September 1, 1993.

III. STATEMENT OF THE CASE

Petitioner was charged with theft of more than $200,000 pursuant to TEX. PEN. CODE ANN §§ 31.03 and 31.09 (Vernon 1994). The indictment alleged a series of 10 thefts in 1991 and an additional 104 in 1995. Slip op. at 3-4.

At the close of the State's case, it abandoned all of the 1991 allegations. After the trial court denied Cuellar's motion for instructed verdict of acquittal, the case went to the jury and Cuellar was convicted of more than $200,000. The jury then sentenced him to 10 years incarceration, probated, and fined him $10,000.

On appeal, Cuellar alleged that the evidence was legally insufficient in that the indictment charged him with a violation of the 1973 Texas Penal Code, which was continued in force by virtue of "savings clauses" in two subsequent statutes, and that when the 1991 allegations were dismissed, the State failed to prove him guilty of the crime with which he was charged, that is violation of the 1973 Texas Penal Code.

The Court of Appeals in its opinion held that the elements of the offense of theft in the 1973 Penal Code was the same as those in the 1994 Penal Code and that the only difference was the punishment range. Slip op. at 6. It also held that Cuellar was sentenced within the statutory punishment

range under either statute. The Court went on to hold that Cuellar has failed to show how the evidence was insufficient based simply on the change of punishment. *Id.*

The Court of Criminal Appeals denied review without comment.

IV. REASONS FOR REVIEW

> Whether the Due Process Clause of the Fourteenth Amendment allows a person to be convicted of violating a statute which has been repealed?

The issue presented in this petition turns on the application of Texas law, changes in that law and the effect of "savings clauses" which keep repealed statutes in effect for offenses committed before the effective date of the replacement statutes.

The issue presented here was first presented to the Court of Appeals for the First District of Texas, which did not deal directly with the issue, and the Court of Criminal Appeals, which refused discretionary review.

The indictment alleged a theft pursuant to "one scheme or continuing course of conduct" by aggregating 10 transactions in July 1991 with 104 transactions in 1995. (C. R. I-3-8).[2]

At the close of the evidence, Appellant moved for an instructed verdict on the 1991 transactions. The prosecutor

---

[2] C.R. refers to the clerks record, the papers in the case. The Roman numeral is the volume number and the Arabic number is the page or pages. Thus, C.R. 1-3-8 is Volume I, pages 3-8 of the clerk's record.

argued in opposition that the transactions alleged in an aggregated theft indictment are not severable. (R. R, IX-10).[3] Immediately after the trial court denied an instructed verdict, the prosecutor moved to "excise" the 1991 transactions from the court's charge. (R.R.XI-12-13). Appellant moved for a mistrial on the ground that the State had alleged those transactions in the indictment as a device to elicit otherwise inadmissible evidence before the jury. (R.R. XI-13-14). The trial court allowed the abandonment and denied the motion for mistrial. (R.R. XI-13-14). The court's charge included no transactions which occurred before March 3, 1995. (C.R. I-175-81)

Because the first transaction set out in the indictment allegedly occurred on July 1, 1991, the indictment charged the offense of aggregated theft pursuant to TEX. PENAL CODE ANN.§ 31.09 (Vernon Supp. 1991), part of the 1973 Texas Penal Code. *Dickens v. State*, 981 S.W.2d 186 (Tex. Crim. App.1998) (1973 Penal Code governs prosecution for aggregated theft if any element of the offense was committed before September 1, 1994). On July 1, 1991, the highest grade of theft under Texas law was a second-degree felony. Theft of more than $100,000 became a first-degree felony on September 1, 1991. Act of May 17, 1991, 72nd Leg. R.S. ch. 565 § 1, Chapter 565 contained a savings clause in § 12(a) which provided that the amendment applied only to offenses committed after September 1, 1991; the prior law remained in effect if any element of the offense was committed before that date.

Theft of more than $200,000 became a first-degree felony when the 1994 Penal Code became effective on September 1, 1994, Act of May 29, 1993, 73rd Legis. R.S., ch.

---

[3] R. R. refers to the court reporter's record or transcript. The Roman numeral designates the volume number and the Arabic Number, the page. Thus, R. R. IX-10, is volume IX, page 10 of the transcript.

900, art. 1, § 1.01, § 31.03(e)(7). However, Chapter 900 contained a savings clause which provided that the prior law remained in effect if any element was committed before September 1, 1994. *Id.*, § 1.18. The State purported to prosecute Appellant for a violation of the first-degree theft statute contained in the 1994 Penal Code.

Because the indictment alleged that Appellant violated the 1973 Texas Penal Code, the State bore the burden of proving that he violated that repealed statute which remained in effect only due to the savings clause. The trial court's charge did not authorize his conviction for a violation of the theft statute in effect in July 1991, nor did the jury find that he engaged in conduct which violated that statute. Once the State abandoned the 1991 transactions, prosecution under the law in effect in July 1991 was not permissible under the savings clause in the 1994 Penal Code.

Because the indictment alleged that Appellant violated the 1973 Texas Penal Code, the State had to prove that an element of the offense occurred while the 1973 Penal Code was in effect. The trial court's charge did not authorize his conviction for a violation of the theft statute in effect in July 1991, nor did the jury find that he engaged in conduct which violated that statute. Once the State abandoned the 1991 transactions, prosecution under the law in effect in July 1991 was not permissible under the savings clause in the 1994 Penal Code.

It follows directly that Petitioner was convicted of violating a repealed statute. The State failed to submit to the jury any allegation that Petitioner committed any act prior to September 1, 1991. By failing to prove that an element of the offense was committed prior to that date, the State failed to show that the 1973 Penal Code remained in effect as applied to Petitioner.

Therefore, Petitioner was convicted of violating a law which had been repealed and which the State failed to prove remained in effect based on the savings clauses in the 1991 and 1993 statutes. The indictment on its face alleged a violation of the 1991 version of the 1973 Penal Code. The instructions submitted to the jury at guilt / innocence (and the punishment charge later submitted to the jury) alleged a violation of the 1994 Penal Code.[4]

In sum, the highest Texas Court, the Court of Criminal Appeals, held in *Dickens* that the 1973 Penal Code is applicable if any element of the offense in the indictment occurred before September 1, 1994. The indictment presented by the State and upon which it tried its case, met the *Dickens* requirement and thereby alleged a violation of the 1973 Penal Code. However, when the State "excised" the 1991 allegations, it no longer charged a violation of the 1973 Penal Code but rather a violation of the 1994 Penal Code.

The only issue before this Court is whether, as a matter of federal law, a person may be convicted of violating a repealed statute even if that repealed statute has been replaced by a later legislative enactment. Petitioner asserts that this is an important matter of federal constitutional and that due process prohibits a conviction for violating a statute which is not in effect at the time of the allegations which are submitted to the jury.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, vacate the

---

[4] Because the punishment range submitted to the jury was greater that that authorized by the 1991 version of the 1973 Penal Code, the result also was an increase in punishment after the acts alleged in the indictment occurred. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1789)

judgment of the Court of Appeals and remand for further consideration.

Respectfully submitted,

SCHNEIDER & McKINNEY, P.C.

STANLEY G. SCHNEIDER
Texas Bar No. 17790500
1301 McKinney
Suite 3100
Houston, Texas 77010
(713) 951-9555
FAX: (713) 951-9854

ATTORNEY FOR PETITIONER